

IN THE SUPREME COURT OF THE STATE OF ARIZONA

FARMERS INVESTMENT COMPANY,
a corporation,

Plaintiff

vs.

THE STATE LAND DEPARTMENT, a
Department of the State of
Arizona; ANDREW L. BETTWY,
State Land Commissioner of the
State of Arizona; and PIMA MINING
COMPANY, real party in interest,

Respondents.

FARMERS INVESTMENT
COMPANY'S RESPONSE:

1. TO RESPONDENTS ANDREW
L. BETTWY, STATE LAND COM-
MISSIONER, AND THE ARIZONA
STATE LAND DEPARTMENT MO-
TION FOR ORDER PURSUANT TO
RULE 94; AND

2. TO PIMA MINING COM-
PANY'S MOTION FOR REHEAR-
ING AND STAY OF MANDATE

Farmers Investment Company (FICO) respectfully
shows the Court:

I

The Attorney General of Arizona, representing the
State Land Commissioner and the State Land Department urges
the Court that it sanction a continuing breach of the trust
provisions of the Enabling Act and a violation of the Arizona
Constitutional provisions adopted in implementation of the
provisions of Section 28 of the Enabling Act.

Section 28 of the Enabling Act provides, inter alia:

"It shall be the duty of the Attorney
General of the United States to prosecute,
in the name of the United States and in its
courts, such proceedings at law or in equity
as may from time to time be necessary and
appropriate to enforce the provisions hereof
relative to the application and disposition
of the said lands and the products thereof
and the funds derived therefrom." (Emphasis
added.)

We assume it is no less the obligation of the Arizona
Attorney General to respect and enforce the Enabling Act and
its trust provisions. Certainly, as Attorney General, the

¹Rule 9 makes no provision for such a motion.

enforcement of the applicable provisions of the Arizona Constitution is his primary responsibility.

The Motion of the Attorney General is not only inappropriate, but factually inaccurate as will be demonstrated in the following parts of this Response.

II

This is not the ordinary case in which a litigant asks the Court to stay its hand and the enforcement of its decision in matters involving only private property rights. The Court has determined that a federal statute, the Enabling Act, and a specific provision of the Arizona Constitution have been and are being violated, and that such a violation constitutes a breach of trust. Respondents ask the Court to condone and authorize a continuation of these violations by its affirmative action in staying its mandate so that these violations may continue.

Not only this, but Respondent Pima Mining Company in effect suggests that the Court become the auctioneer in a private sale to a selected bidder without public notice, as required by law, by conditioning its order granting a stay upon Pima paying an increased price for the water extracted.

III

The Motions of the Attorney General and of Pima Mining Company in legal effect require that this Court in effect decide the issue of the lawfulness of Pima's use of groundwater in the Sahuarita-Continental Critical Groundwater Area in addition to the validity of such use under the terms of Commercial Lease No. 906, an issue the Court expressly refused to resolve in its order accepting jurisdiction of PICO's Special Action Petition and in its formal decision.

The Respondents' motions are predicated upon the assumption that, in fact, the State Land Department may lawfully auction and sell groundwater to be pumped from state lands located within a critical groundwater area for use outside of such a critical groundwater area, and for a use unrelated to the beneficial use of the land from which it is withdrawn. The major premise supporting the requested stay for 180 days is that this amount of time is required to set up the procedures and make the necessary preparations to permit such an auction. To grant the stay requested is tantamount to deciding that such a procedure would be for a lawful purpose.

Respondents therefore are actually asking the Court to make a determination that such auction and use under the facts of this case would not violate previous adjudications of this Court applicable to the proposed use Pima would make of the groundwater the subject of this auction procedure.

IV

Pima, as is its custom, dwells at length upon the financial benefits and losses to the state if Pima is finally required to respect the law almost as if adherence to the law may be condoned "if the price is right". This argument, often referred to as the "interrorem" argument, is generally utilized when there is no legal justification for the position of the party making the argument. In 1909, Arizona Copper Company made much the same appeal to the Territorial Supreme Court in Arizona Copper Co. v. Gillespie, 12 Ariz. 199, 204, 205, 100 Pac. 465, as Pima makes here. The Territorial Court rejected the appeal and the United States Supreme Court affirmed.

Pima has been forewarned that Commercial Lease No. 906 was of doubtful validity. On April 19, 1971, FICO filed its verified Petition for Injunctive Relief in this Court #10486, entitled, FARMERS INVESTMENT COMPANY, a corporation, Petitioner, v. THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona; and PIMA MINING COMPANY, real party in interest, Respondents. Petitioner therein alleged:

" . . . the issuance of Commercial Lease No. 906 authorizing Pima Mining Company to construct water wells on state school land and the issuance of Commercial Lease No. 906 authorizing Pima Mining Company to construct water wells on state school land within a critical groundwater area to withdraw groundwater from state school land to be transported outside of and used outside of said state school land and said critical area and the failure of The State Land Department to cancel the same constitutes a continuing legal wrong to Petitioner and a breach of trust under the provisions and requirements of the Enabling Act, particularly Section 28 thereof."

Pima's Return to the Order to Show Cause and the verified map exhibits attached to the Petition, in said cause #10486, shows that Pima has thirteen wells drawing groundwater (or capable of drawing groundwater) from the critical area, only four of which are located within the area covered by Commercial Lease No. 906.

In the Affidavit of Paul Allen, President of Pima, attached to the Response of Pima in said cause, the unqualified assertion is made that ^{if} two of Pima's wells were not available for production, the loss of their water production would not disable Pima. Mr. Allen stated under oath:

"If we did not have those wells (Pima wells #12 and #14) we necessarily would increase water production, though less efficiently, from our present wells to generate the necessary water for our contemplated expansion."

* * *

"The required water use for the expansion can be met by use of the existing wells, if necessary. However, it is better water practice to spread out the use of wells by having more wells over a wider area than having fewer wells pumping heavily for protracted periods. Also, it is advisable to have unused, reserve wells in the event of mechanical breakdown because a shutdown of the mill involves very large monetary loss."

* * *

"On the other hand, Petitioner is not hurt by our completion of such wells. No increased production of water will result by reason of such wells. If we did not have those wells, we necessarily would increase water production, though less efficiently, from our present wells to generate the necessary water for our contemplated expansion."

In 1971, when it served Pima's purposes, Mr. Allen verified the fact that Pima could lose the production of two of its wells and lose no production, but today loss of only two additional wells is represented as causing a drop in production of 36%-40%.

Pima, also in 1971, when it was engaged in expansion of its water use in the face of the pending lawsuit challenging its use of groundwater, stated, again by affidavit, that it recognized that its water use might be unlawful and that it assumed the risk. (Paul Allen Affidavit to Return.)

V

Pima's request for a stay to allow Pima to file a Petition for a Writ of Certiorari is without merit.

In a consideration of this Motion, Appellant believes the following principles are appropriate:

1. Pima will not be disabled from seeking review by the United States Supreme Court if the stay is denied. Jurisdiction of the United States Supreme Court is not lost if the mandate of the lower court has gone down. Any Justice of the Supreme Court as well as the Court itself may grant

a stay. 28 U.S.C. Sec. 2101(f). Carr v. Zaja, 283 U.S. 52, 53; Aetna Casualty Co. v. Flowers, 330 U.S. 464, 467; Porter v. Lee, 328 U.S. 246.

2. In cases where the stay sought will in effect suspend the effect of a federal statute and a constitutional provision, the power to stay should therefore be exercised only in the most extraordinary and compelling circumstances.

Heart of Atlanta Motel, Inc. v. U.S., 85 S.Ct. 1, 2, 13 L. Ed. 2d 12; Wasmuth v. Allen, 85 S.Ct. 5, 6, 13 L. Ed. 2d 10, 11.

3. The stay should only be granted if an informed judgment concludes there is sufficient merit in the proposed petition in certiorari to conclude the Court will accept it.

"Even assuming, however, the possibilities of irreparable injury and mootness, as claimed by the petitioners, I do not feel at liberty to grant their application (for a stay) unless in my judgment there is a prospect that the petition for certiorari which they propose to file will appear to at least four members of the Court to present questions which will warrant our review." Per Mr. Justice Brennan in Appalachian Power Co. v. American Institute of C.P.A., 80 S.Ct. 16, 18, 4 L. Ed. 2d 30, 32.

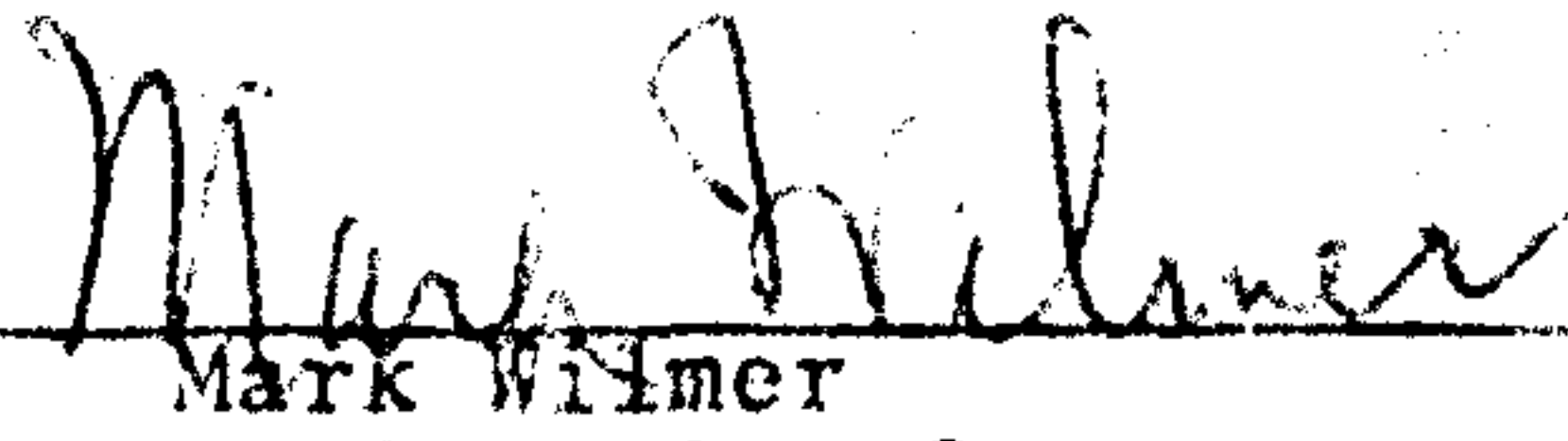
The question decided by this Court was a narrow one. The language of the Enabling Act construed by this Court is clear and the Court's opinion sustained the purpose and spirit of the federal statute. The likelihood of favorable consideration of a Petition for Certiorari by the United States Supreme Court is remote.

In any event, Pima has the right to apply to the United States Supreme Court, or any Justice thereof, for a stay. If in the informed judgment of any Justice of the United States Supreme Court there is merit in Pima's claim, a stay can be allowed.

Respectfully submitted,

SNELL & WILMER

By

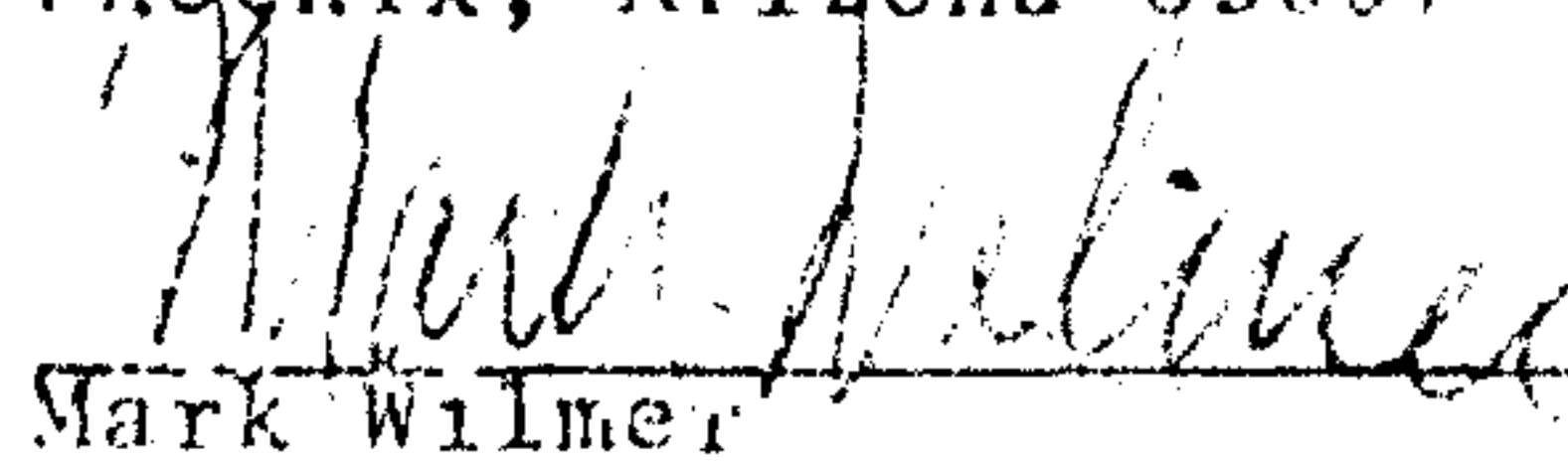


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COPIES of the foregoing
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